No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

The ACLJ has been active in litigation concerning the Affordable Care Act ("ACA"), the statute on which Respondents rely to promulgate the regulatory mandate, at issue here, to require employers to cover contraceptive services, including abortion-inducing drugs, sterilization, and related patient education and counseling services in their health insurance plans ("the Mandate"). The ACLJ filed several *amicus curiae* briefs in support of various challenges to provisions of the ACA, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), and represented the plaintiffs in their challenge to provisions of the ACA in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *superseded on other grounds by* 132 S. Ct. 2566 (2012).

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing this brief. Copies of the parties' consent letters are on file with the Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In addition, the ACLJ has represented numerous closely held corporations and their owners in challenges against the Mandate, *e.g.*, *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014), and filed an *amicus curiae* brief with this Court in support of plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

This case is gravely important to the future protection of religious freedom in this country and is therefore of special interest to the ACLJ.[2]

SUMMARY OF ARGUMENT

Last year, this Court held that the United States Department of Health and Human Services ("HHS") violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq*. ("RFRA"), when it imposed an obligation on closely held corporations to "provide health-insurance coverage for methods of contraception that violate[d] the sincerely held beliefs of the companies' owners." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). Now, HHS is imposing unlawful obligations on non-profit religious organizations with religious objections to contraceptive services by requiring them to take affirmative action, through participation in a so-called "accommodation" scheme, that violates their religious conscience.

In this case, HHS is mandating that Petitioner, Little Sisters of the Poor Home for the Aged ("Little

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[2] This brief is also submitted on behalf of more than 140,000 supporters of the ACLJ as an expression of their opposition to the Mandate's encroachment on religious civil liberties.

Sisters"), a Catholic religious order of women religious, execute a document that the Little Sisters insist will trigger—and HHS, ironically, insists is *essential* to—the provision of contraception coverage to their employees, using the information, network, and infrastructure of the Sisters' health plan. This, the Little Sisters believe, will render them morally complicit in providing contraceptive coverage against their religious beliefs. Such complicity is forbidden by the Little Sisters' Catholic faith.

The Tenth Circuit upheld HHS's action on the grounds that executing the document involved mere "*de minimis* administrative tasks [that] do not substantially burden religious exercise for the purposes of RFRA. *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 13-1540, 2015 U.S. App. LEXIS 12145, *51 (10th Cir. July 14, 2015). In other words, the Tenth Circuit deemed the Little Sisters' moral analysis of complicity unreasonable, because their execution of the accommodation document would not *actually* render them complicit. Thus, according to the lower court, the accommodation does not substantially burden the Little Sisters' religious exercise.

The Tenth Circuit's decision is both wrong and completely antithetical to genuine religious liberty. This case is not materially distinguishable from *Hobby Lobby*. Though the Little Sisters have been afforded an alternative not afforded the *Hobby Lobby* plaintiffs, the unacceptability of this alternative negates its value to the Little Sisters. Compulsion to engage in two or three bad options in no less a RFRA violation than a compulsion to engage in one.

The Tenth Circuit wrongly second-guessed the Little Sisters' theological analysis of their culpability. The proper, and narrow, role of the courts in determining whether a religious objector's exercise is substantially burdened under RFRA is to determine the substantiality of the *penalties* for noncompliance, not to question the objector's moral theology. Hypothetical concerns about opening the door to more religious objection claims cannot be used to defeat a finding of substantial burden. If the Tenth Circuit had properly found that HHS substantially burdened the Little Sisters' religious exercise, they would have prevailed on their RFRA claim.

ARGUMENT

I. This case is not materially distinguishable from *Hobby Lobby*.

The Tenth Circuit held that *Hobby Lobby* does not control this case because of the supposed "accommodation" available to the Little Sisters. HHS demands that the Little Sisters (1) directly comply with the Mandate themselves by paying for and providing the drugs and services to which they religiously object, or (2) execute a document that triggers HHS's arrangement of such coverage through their insurer (the so-called "accommodation"), or (3) pay a significant monetary penalty for failure to comply. The Little Sisters sincerely believe that the first two options—direct compliance and the facilitation of the same wrong—violate their religious beliefs and substantially burden their religious exercise. As for the third option, this Court held in *Hobby Lobby* that a government action requiring employers to choose between violating their religious consciences and

paying a financial penalty constitutes a substantial burden on religious exercise. *Hobby Lobby*, 134 S. Ct. at 2759.

In *Hobby Lobby*, the government required the plaintiffs to choose between two alternatives: (1) comply with the Mandate by providing contraceptive coverage in violation of their religious consciences or (2) not comply and pay significant penalties. *Hobby Lobby*, 134 S. Ct. at 2766. The Court concluded, "If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price . . . If these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759.

As the Tenth Circuit correctly noted, the Little Sisters have three rather than two religiously burdensome alternatives from which to choose. However, the Tenth Circuit wrongly believed that this difference between the cases "[was] significant and frame[d] the issue. . . ." *Little Sisters*, 2015 U.S. App. LEXIS 12145 at *13. In reality, the Little Sisters' predicament is equally as onerous as was the predicament of the plaintiffs in *Hobby Lobby*. The only difference between *Hobby Lobby* and this case is that there are two options (instead of one) that violate Petitioner's religious conscience. The issue in both cases is therefore the same: whether requiring the Little Sisters to pick their poison in the form of violating their religious conscience or paying a significant monetary penalty constitutes a substantial burden on religious exercise.

The Tenth Circuit erred by rejecting the *Hobby Lobby* framework as controlling; had it not done so, it would have been obligated to follow *Hobby Lobby's* rule against second-guessing the reasonableness of a religious objector's claim.

II. *Hobby Lobby* does not permit courts to second-guess the reasonableness of a religious objector's sincere claim.

The Tenth Circuit disagreed with the Little Sisters' claim that availing themselves of the accommodation scheme would render them morally complicit in providing contraceptive services, and that such complicity would substantially burden their religious beliefs and practices. The Tenth Circuit held that *"[a]lthough we recognize and respect the sincerity of Plaintiffs' beliefs and arguments*, we conclude the accommodation scheme relieves Plaintiffs of their obligations under the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights." *Little Sisters*, 2015 U.S. App. LEXIS 12145 at *12 (emphasis added). The Tenth Circuit based its conclusion on the following reasoning:

> The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the

> overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these *de minimis* administrative tasks do not substantially burden religious exercise for the purposes of RFRA.

Id. at *50–51.

This logic is fundamentally flawed. The Tenth Circuit—and the federal government—cannot simultaneously argue that the act it requires of the Little Sisters is *de minimis* and causally meaningless, and yet assert that this same act is somehow essential to the functioning of the government's contraceptive program. If the act were truly *de minimis*, and the coverage compelled independently by federal law, then the government could waive the requirement (as it does for churches, grandfathered plans, etc.). A government agency does not litigate ferociously in defense of a meaningless requirement.

Moreover, in reaching its conclusion, the Tenth Circuit did something *Hobby Lobby* forbids, namely, instruct the Little Sisters that their religiously motivated complicity claim is unreasonable, because—contrary to what the Little Sisters themselves believe—the steps the Little Sisters must affirmatively take to obtain the so-called "accommodation" is *actually* a minimal, morally meaningless intrusion on their religious exercise. In other words, the Tenth Circuit improperly sat in judgment of a theological conclusion.

In contrast to the Tenth Circuit, this Court deferred to the plaintiffs' religious beliefs in *Hobby Lobby*, stating: "[I]n these cases, the [plaintiffs'] sincerely

believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and *it is not for us to say that their religious beliefs are mistaken or insubstantial*. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted) (emphasis added).

The Court's analysis was in response to a similar argument HHS makes in this case. In *Hobby Lobby*, faced with plaintiffs who would not comply with the contraceptive coverage mandate due to their religious opposition to abortion, HHS asserted that the "connection between what the objecting parties must do . . . and the end they find to be morally wrong . . . is simply too attenuated" to constitute a substantial burden. *Id.* at 2777. Specifically, HHS argued, "[c]overage would not itself result in the destruction of an embryo," and insisted, "[t]hat would occur only if an employee chose to take advantage of the coverage and to use one of the four methods [of contraception] at issue." *Id.*

This Court rejected HHS's second-guessing of the plaintiffs' analysis of their complicity, holding that this approach "dodges the question RFRA presents"; namely, evaluating the substantial burden imposed by the government on the objecting parties' ability to exercise "*their* religious beliefs"—not what a court or executive agency considers their religious beliefs to entail. *Id.* at 2778 (emphasis added). The complicity analysis used by "HHS . . . in effect tell[s] the plaintiffs that their beliefs are flawed"—but "the federal courts have no business addressing whether the religious

belief asserted in a RFRA case is reasonable." *Id.* "It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." *Id.* at 2757.

The proposition that courts have no business scrutinizing a religious objector's understanding of his own moral complicity is not new. *Id.* at 2778; *cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 101 S. Ct. 1425 (1981). A court's only task in evaluating the burden prong in a RFRA case is the "narrow function" of "determining whether the line drawn reflects an honest conviction." *Hobby Lobby,* 134 S. Ct. at 2779 (internal quotes removed).

The Tenth Circuit paid little heed to this precedent. The court below was wrong to second-guess the Little Sisters' *own* theological analysis of their *own* moral complicity that was based on their sincerely held religious beliefs.

III. RFRA, properly applied, does not lead to the slippery slope of religious believers becoming a law unto themselves.

It is not true that granting the Little Sisters, and similarly situated nonprofit religious groups, relief from complying with the contraceptive mandate will lead to a slippery slope where any religious individual or group can invalidate important, generally applicable laws. RFRA imposes serious safeguards against the misuses of such claims. In particular, only a *sincere* claim of religious exercise may proceed—opportunistic shams are not protected. *Id.* at 2774, n. 28. Moreover, simply recognizing that a religious objector's beliefs and practices are substantially burdened does not mean that the objector will automatically prevail

against competing government interests. As this Court recently noted in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), a federal regulation will only be struck down under RFRA when, as RFRA itself states, there is either no compelling interest or there is a less restrictive means available to the government for achieving its interest. *Id.* at 863; 42 U.S.C. § 2000bb–1(b). In this case, there exists at least one other way for the government to fulfill its interests through less restrictive means: allow employees to seek out subsidized contraceptive benefits themselves on the ACA's exchanges. *Hobby Lobby,* 134 S. Ct. 2783.

Accepting the Little Sisters' understanding of what constitutes a substantial burden under RFRA reflects sound Establishment Clause principles of avoiding excessive entanglement between government and religion. *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971). *See also Agostini v. Felton,* 521 U.S. 203 (1997). The real slippery slope danger in this case is the excessive entanglement problem that the Tenth Circuit has established in allowing courts to second-guess a religious adherent's understanding of what does and does not constitute a substantial burden on that adherent's religious beliefs. Such second-guessing puts judges in the untenable position of arbitrating essentially religious questions, which the First Amendment's Religion Clauses do not permit. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 132 S. Ct. 694, 712 (2012); *Hobby Lobby*, 134 S. Ct. at 2778 (citations omitted).

Judicial second-guessing of religious beliefs appears to reflect a fear that protecting religious liberty will make each man a law unto himself, ultimately

resulting in harm to third parties. *See Employment Div. v. Smith*, 494 U.S. 872, 911–913 (1990). However, legal precedent of this Court and the wording of RFRA itself allay these concerns. *See Hobby Lobby*, 134 S. Ct. at 2783-2785. This Court stressed that its ruling did not "suggest that RFRA demands accommodation of . . . religious beliefs no matter the impact that accommodation may have on" others. *Id.* at 2760 (internal quotations omitted). A claim under RFRA for a religious accommodation cannot be used to justify any and all religious exemptions.

Moreover, it should be noted, the mischaracterization of religious free exercise as denying or imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1972). The parent who removes his or her Amish child from formal high school education denies that child the instruction that would otherwise be given. *But see Wisconsin v. Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," Forward.com (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham.").[3] And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, World Health Organization media

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[3] http://forward.com/articles/152606/constitutional-dilemma-on-birth-control/ (last visited, August 20, 2015).

centre fact sheet (Feb. 2014),[4] or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 NeuroReport 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb),[5] each impose upon the would-be recipients of those procedures (or their parents). To be sure, concrete injury to third parties, when actually present, is a valid consideration in applying strict scrutiny to assertions of religious freedom. But treating religious exercise as presumptively suspect because it may affect third parties makes no more sense than treating free speech, freedom of association, or Fourth Amendment rights as presumptively suspect because they, too, may affect third parties in some vague or indirect way.

As *Hobby Lobby* observes, past precedent prevents every man from becoming a law unto himself in the context of religious freedom. *Id.* at 2783-84 (citing *United States v. Lee*, 455 U.S. 252 (1982)). In *Lee*, this Court held that "not all burdens on religion are unconstitutional." *Lee*, 455 U.S. at 257. Specifically, this Court held that "the State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," such as running a national tax system. *Id.* (citations omitted). While *Lee* was a pre-RFRA decision, in *Hobby Lobby*, this Court applied *Lee* as evidence of an instance in which the government's actions would be both in furtherance of a compelling government

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[4] http://www.who.int/mediacentre/factsheets/fs241/en/ (last visited, August 20, 2015).

[5] http://cbc.ucsd.edu/pdf/apotem.pdf (last visited, August 20, 2015).

interest and be the least restrictive means to further that interest, satisfying RFRA. *Hobby Lobby*, 134 S. Ct. at 2783-84. Judicial second-guessing of a religious claimant's understanding of what constitutes coercive pressure on his or her ability to practice religion is thus neither proper nor necessary to protect the rule of law.

IV. The HHS accommodation scheme is not the least restrictive means of achieving the government's interests.

While the court below did not reach the issue, it merits emphasis that requiring the Little Sisters to avail themselves of the accommodation scheme is not the least restrictive means of advancing a compelling government interest. *Id.* at 112.

Assuming, for purposes of strict scrutiny, that the provision of free contraceptive healthcare to all female employees constitutes a compelling government interest, HHS's accommodation scheme is not the least restrictive means of furthering that interest. In *Hobby Lobby*, this Court reaffirmed that "[t]he least-restrictive means standard is exceptionally demanding," and that, under this standard, the government must show it does not have "other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties . . ." *Hobby Lobby*, 134 S. Ct. at 2780 (citations omitted). In this case, HHS has other means of providing contraceptive coverage without requiring the Little Sisters to undertake any action that violates their religious convictions.

This Court suggested in *Hobby Lobby* that "the most straightforward way" of increasing access to free

contraception in a manner that is less-restrictive on religious employers would be for the government to "assume the cost of providing the . . . contraceptives to women unable to obtain coverage due to their employers' religious objections." *Id.* at 2757. This Court found it hard to understand how, if the object of the contraceptive mandate really is a compelling government interest, the government "cannot be required under RFRA to pay *anything* in order to achieve this important goal." *Id.* at 2781. After all, under certain circumstances, RFRA may "require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 2781.

Moreover, instead of requiring religious objectors, such as the Little Sisters, to provide contraceptive coverage themselves or to avail themselves of a scheme that they believe makes them morally complicit in providing contraceptive coverage against their religious conscience, the government could simply authorize individual employees who want free contraceptive coverage to seek it out through the ACA's insurance exchanges, rather than through the employer's insurance plan, with whatever subsidy the government deems necessary. This proposed solution would be consistent with many other public benefit programs that require citizens to enroll themselves before obtaining benefits, and it is therefore a less restrictive alternative under RFRA. *See Hobby Lobby*, 134 S. Ct. at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully ask this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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